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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1014

GEORGIA L. LUSK
&
MYRON WIENER,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Claims entered October 15, 1965 in the cause entitled *Georgia L. Lusk and Myron Wiener v. The United States*, Ct.Cl. No. 518-59.

OPINION BELOW

The opinion of the United States Court of Claims (Appendix A) will be reported in ___ Ct.Cl. ___ (1965). The stipulation of facts entered by counsel for the parties and filed with the court below on March 18, 1964 which provided the basis for defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment, while not incorporated in the decision of the court below, is fully set forth herein as Appendix B.

JURISDICTION

The judgment and order of the United States Court of claims was entered on October 15, 1965. On application by petitioners, this Court, on January 12, 1966 entered its order extending petitioners' time in which to file a petition for a writ of certiorari to and including February 13, 1966.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1255 (1).

QUESTIONS PRESENTED

1 (a). Did Congress, in enacting the Reorganization Act of 1949, confer or intend to confer on the president the authority to affect, influence, or otherwise control the performance of quasi-legislative, quasi-judicial functions of "independent" agencies such as the War Claims Commission, which had been expressly created by Congress in 1948 to be free from all executive influence and control and whose commissioners were not subject to executive removal but enjoyed tenure for the full term of the Commis-

sion's statutory life,[1] by granting to the president the power — under the guise of executive reorganization — to abolish that agency prior to the statutory expiration of said Commission and to transfer the functions thereof to a newly created agency wherein the commissioners serve at the pleasure of the president?

1 (b). If Congress, in enacting the Reorganization Act of 1949, did intend — as the court below held — to confer on the president the aforesaid authority, was such act unconstitutional as an improper delegation of legislative power, to wit, the presidential power to repeal an act creating such independent agency contrary to, and in contravention of, the provisions of Article I, Sections 1 and 8 of the United States Constitution? (Note: Though this constitutional issue was properly raised, briefed, and argued and is intrinsically related to the statutory interpretation adopted by the court below, the question was not considered or decided since the court below deemed its assertion barred by laches.

2 (a). Can the Court of Claims bar a claim at law against the United States commenced within the congressionally prescribed statutory period, by applying the doctrine of laches (1) where there has been no prejudice to the Government's ability or capacity to defend the suit, all pertinent facts having been stipulated; (2) where there has been no accretion in the amount of any damages for which the Government may be liable by virtue of any "delay" in the commencement of the suit; and (3) where the sole prejudice to the United States found by the court below was the possibility of future litigation if petitioners' position be sustained?

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[1] See Wiener v. United States, 357 U.S. 349 (1958).

2 (b). Where the questions of law presented by a claim involve primarily the interpretation of statutory language, and there is no dispute as to the pertinent facts, could the court below apply the doctrine of laches to bar the claim?

2 (c). Where the interpretation of statutory language by the Court of Claims raises a question of the constitutionality of the statute as so interpreted, can the Court of Claims refuse to consider that constitutional question on the ground of laches?

STATUTES INVOLVED

The provisions of the Reorganization Act of 1949, 63 Stat. 203, 5 U.S.C. § 133z (1949) involved herein, are as follows:

> 133z – 4. *Effective date of reorganizations specified in plan*
>
> (a) Except as may be otherwise provided pursuant to subsection (c) of this section, the provisions of the reorganization plan shall take effect upon the expiration of the first period of sixty calendar days, of continuous session of the Congress, following the date on which the plan is transmitted to it; but only if, between the date of transmittal and the expiration of such sixty-day period there has not been passed by either of the two Houses, by the affirmative vote of a majority of the authorized membership of that House, a resolution stating in substance that that House does not favor the reorganization plan.
>
> (b) For the purposes of subsection (a) of this section –
>
> (1) continuity of session shall be considered as broken only by an adjournment of the Congress

sine die; but

(2) in the computation of the sixty-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than three days to a day certain.

(c) Any provision of the plan may, under provisions contained in the plan, be made operative at a time later than the date on which the plan shall otherwise take effect. June 20, 1949, c. 226, Title I, § 6, 63 Stat. 205.

§ 133z–5. *Definition of "agency"*

When used in sections 133z-133z–15 of this title, the term "agency" means any executive department, commission, council, independent establishment, Government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government, and means also any and all parts of the municipal government of the District of Columbia except the courts thereof. Such term does not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government. June 20, 1949, c. 226, Title I, § 7, 63 Stat. 205.

The pertinent portion of 28 U.S.C. § 401 involved is as follows:

§ 2501. *Time for filing suit*

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

STATEMENT

Petitioners herein, Lusk and Wiener, had been appointed by President Truman (with the advice and consent of the Senate) to serve as Commissioners of the War Claims Commission. They were serving in that capacity when, in 1953, President Eisenhower requested their resignations so that he might appoint in their places "personnel of my own selection." They both refused to resign and were unlawfully removed from office, *Wiener v. United States,* 357 U.S. 349 (1958). The President thereupon attempted, through recess appointment, to name successors to their posts. *Said recess appointees were never confirmed by the Senate prior to July 1, 1954.*

Petitioner Wiener immediately sought to contest the removal and the recess appointments by requesting the Attorney General to institute *appropriate* proceedings. The Attorney General having refused to do so, petitioner Wiener, on February 3, 1954, did institute *quo warranto* proceedings challenging the right of the nominees of the President to hold office as War Claims Commissioners, *The United States ex rel Myron Wiener v. Raymond T. Armbruster, Whitney Gilliland, and Pearl Carter Pace,* United States District Court for the District of Columbia, C.A. No. 447-54.

While said proceedings were pending in the United States Court of Appeals, the President, on April 29, 1954, transmitted to Congress, Reorganization Plan No. 1 of 1954 whereby he purported (1) to abolish the War Claims Commission; (2) to abolish the International Claims Settlement Commission; and (3) to transfer *all the functions* of both commissions to a newly created commission to be known as the Foreign Claims Settlement Commission.

Whereas the Commissioners of the War Claims Commission had enjoyed tenure for the statutory life of the War Claims Commission and had not been subject to executive removal, control, or other executive influence in the conduct of their duties, *Wiener v. United States, supra,* the tenure of the Commissioners of the newly "reorganized" Commission were expressly made subject to executive removal and served at the pleasure of the president.[2] The aforesaid Reorganization purported to be pursuant to the authority granted to the president under the Reorganization Act of 1949, 5 U.S.C. § 133z, *et seq.*

Subsequent to the effective date of Reorganization Plan No. 1 of 1954, to wit, July 1, 1954, the parties to the aforedescribed *quo warranto* proceeding pending in the United States Court of Appeals, agreed to a dismissal of the appeal on the grounds that the basic issue therein presented had been rendered moot by virtue of said reorganization. Thereupon, on the 20th day of August, 1954, petitioner Wiener instituted suit in the United States Court of Claims (Ct.Cl. No. 337-54) for the recovery of salary he was prevented from earning during the period December 11, 1954 through June 30, 1954. This Court, in *Wiener v. United States, supra,* held that petitioner Wiener's removal by the President was unlawful, and remanded the cause to the United States Court of Claims which, on August 27, 1958, *on the written stipulation of the parties,* entered judgment for plaintiff Wiener, 143 Ct.Cl. 956

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[2] Under the original International Claims Settlement Act, the president was empowered to abolish that agency and to set the terms of office of its commissioners, and the commissioners were subject to removal by the Secretary of State, International Claims Settlement Act of 1949, § 3(c), Pub. L. 455, 64 Stat. 12, 81st Cong., 2d Sess. (1950).

(1958). Subsequent to that date, petitioner Lusk submitted her claim for salary for the period December 10, 1953 through June 30, 1954, during which period she was unemployed, to the General Accounting Office, and in December, 1958 received payment of said claim.

On December 2, 1959, approximately one year after petitioner Lusk received payment from the General Accounting Office, *one year and three months* after entry of judgment in the aforesaid *Wiener* case, and five years and five months after the effective date of Reorganization Plan No. 1 of 1954, both petitioners Lusk and Wiener jointly filed the instant suit in the Court of Claims contesting the validity, propriety, and/or legality of Reorganization Plan No. 1 of 1954, and, alternatively, the constitutionality of the Reorganization Act of 1949.

Petitioners contended below that Reorganization Plan No. 1 of 1954 was contrary to, and violated the express provisions of the Reorganization Act of 1949, *supra,* since that act did not authorize or invest the executive with the right to affect, influence, control, or otherwise impinge upon the *legislative and judicial functions* of a quasi-legislative and quasi-judicial agency such as the War Claims Commission. Alternatively, petitioners contended that should the Reorganization Act of 1949 be construed as permitting and authorizing the executive to affect, influence, control, or otherwise impinge on the performance of legislative and/or judicial functions by such a quasi-legislative, quasi-judicial agency, such act was unconstitutional as an improper delegation to the executive of the functions reserved under the Constitution exclusively to the legislature.

The court below, by decision dated October 15, 1965, held that the Reorganization Act of 1949 did authorize and permit the executive to affect, influence, control, or otherwise impinge on the discharge of legislative and executive functions of the War Claims Commission, and *additionally held, that in any event, the claim was barred by laches.* The court below did not address itself to the constitutional question which arose from the statutory construction it adopted since "... plaintiffs are precluded, on the ground of laches, from attacking the constitutionality of the Reorganization Act. . . ." (Slip Opinion, page 7, Appendix A).

The court below purported to premise its holding of laches on (1) unreasonable delay, and (2) actual detriment or prejudice to defendant. The sole prejudice to defendant found and relied on by the court below was the ". . . possibility of 'litigation by private interests resisting the acts of a reorganized agency on the ground that it was illegally constituted,'" Accordingly, the court granted the Government's motion for summary judgment, denied petitioners' cross-motion for summary judgment, and dismissed the petition.

REASONS FOR GRANTING WRIT

1. The decision of the Court below construing the Reorganization Act of 1949 raises timely and cogent issues which merit the attention and concern of this Court. In President Johnson's State of the Union message in January of this year, the present need for broad-scale *executive* reorganization was emphasized. Since the Reorganization Act of 1949 constitutes the existing statutory means by which executive reorganizations may be accomplished, since the decision below represents the *first* judicial construction

of the scope and applicability of that act, and since the construction adopted below does raise serious constitutional questions affecting the separation of powers, as well as the very nature of the legislative power, a definitive review of that decision is in order.

In addition to those governmental agencies which perform purely "executive" functions, many agencies and commissions have been designated by Congress to perform special functions which are essentially legislative or judicial in nature — functions such as the regulation of trade, communications, and utilities (Federal Trade Commission, Federal Communications Commission, Federal Power Commission), labor-dispute adjudication (National Labor Relations Board), or claims and tax disputes (War Claims Commission, Tax Court). Such agencies, in many respects, necessarily exercise some form of limited executive power with respect to "housekeeping" activities, e.g., personnel, supplies, and other administrative details. Their primary *raison d'etre* is the performance of functions under applicable and specific congressional directives as "quasi-legislative" or "quasi-judicial" bodies. Yet as this Court has stated, none of these bodies can

> . . . in any proper sense be characterized as an arm or an eye of the executive . . . . To the extent that it exercises any executive function — as distinguished from executive power in the constitutional sense — it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government, *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1934).

In the past, many of such agencies and commissions have been reorganized under the authority of

the 1949 Act.[3] Never, however, have the legislative and judicial *powers and functions* of any independent agency other than the War Claims Commission been affected by a presidential reorganization under the Act insofar as petitioners have been able to ascertain. Yet the court below held that:

> . . . Congress did *not* wish the Reorganization Act of 1949 to impose any general limitation upon the reorganization of quasi-judicial and quasi-legislative functions (Slip Opinion, page 5, Appendix A).

That holding would clearly seem to encompass and support executive reorganizations of all those functions in *all* agencies, including those heretofore mentioned. The decision below has a patent effect on the doctrine of the separation of powers flowing from

> . . . the fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others. (*Humphrey's Executor v. United States, supra,* at 629.)

and makes it vital that this Court review the decision below insofar as it supports presidential action which results in the modification, alteration, or abolition of any quasi-legislative, quasi-judicial agency.

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[3] E.g., Federal Trade Commission — Reorganization Plan No. 8 of 1950; Federal Maritime Commission — Reorganization Plan No. 6 of 1949, Reorganization Plan No. 21 of 1950, Reorganization Plan No. 7 of 1961; Federal Power Commission — Reorganization Plan No. 9 of 1950; Civil Aeronautics Board — Reorganization Plan No. 13 of 1950; and Securities & Exchange Commission — Reorganization Plan No. 10 of 1950.

An even more fundamental issue, which goes to the heart of the legislative process under our constitutional form of government, is raised by the decision of the court below. Under the language of the Reorganization Act, a presidentially-submitted reorganization plan will automatically go into effect within sixty days if a majority of the "authorized membership" of either house of the legislature does not vote a disapproval. But can any presidential act be allowed to substantially affect, alter, modify, or abolish a specific and express statutory grant of authority to an independent agency, thus effectively amending or repealing an act of Congress through congressional inactivity? The court below held that ". . . by not exercising its power of disapproval, the Congress indicated its full acceptance of the plan," (Slip Opinion, page 6, Appendix A). That conclusion does not appear consonant with the implications of this Court's language in *Greene v. McElroy,* 360 U.S. 474, 507 (1959):

> . . . explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effort would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

In *Youngstown Sheet and Tube Company v. Sawyer,* 343 U.S. 579, 587 (1951), this Court pointed out that under our Constitution, the powers of the president were limited to ". . . the recommending of the laws he thinks wise and the vetoing of laws he thinks bad." But no court has ever addressed itself to the question of whether a recommendation of the president can, in

fact, be enacted into law through congressional inactivity or, as characterized by defendant below, by the "tacit approval" of Congress.[4] Though the act of legislating — in this country as well as in England — is traditionally one of affirmative action by the legislature, petitioners find no specific authority, in the decisions of this Court or elsewhere, that legislation through inaction, or tacit action, is improper. Yet, since any utilization of this technique necessarily results in a shifting of initiative from the legislature to some other source, this fundamental question deserves the consideration of this Court.

Moreover, the construction adopted by the court below would empower the president — under the guise of reorganization — to discharge officers outside the executive branch by abolishing an agency and transferring its functions to another agency. Such a result, of course, would be in direct derogation of this Court's decisions in *Humphrey's Executor v. United States, supra,* and *Wiener v. United States, supra.* Yet it would be impossible to attribute and to *prove*

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[4] But some members of Congress have expressed misgivings about the constitutional propriety of this procedure; cf., additional views of the Honorable Clare E. Hoffman of Michigan, H. Rep. No. 367, 86th Cong., 1st Sess. (1959):

> The act reverses the constitutional legislative process, under which the Congress, subject to a conditional veto, enacts legislation. Under the Reorganization Act, the President, subject to a veto by the Congress, writes legislation.

a meritricious presidential motive underlying any such reorganization. Indeed, the replacement of certain officers, perhaps of a different political persuasion, with personnel of his own choosing might well appear to a president to be the single, most important step to take to promote "efficiency" in a given agency. Consequently, though the decision below does not directly conflict with the cited decisions of this Court, it does hold that, although the Commissioners may have been personally free from *direct* "control or coercive influence," the agency itself is *not* a

> . . . body that was 'entirely free from the control or coercive influence direct or indirect,' *Humphrey's Executor v. United States*, supra, 295 U.S. 629, of either the executive or Congress. . . . (*Wiener v. United States, supra,* at 355.)

The apparent and potential conflict arising from the possibility of permitting through indirection that which clearly cannot be accomplished directly offers a proper subject meriting review by this Court at this time.

2. The decision of the Court of Claims rests, in substantial part, on the doctrine of *laches* — the traditionally equitable principle that a claimant may be barred from presenting and prosecuting an otherwise meritorious claim if his delay in initiating the action is unreasonable and will result in substantial and irreparable prejudice to the defendant. The court below utilized the doctrine of laches as an alternative ground for disposition of the statutory interpretation question. More importantly, however, the court avoided any discussion of the constitutional question squarely raised by their interpretation by stating:

> Since we hold that plaintiffs are precluded, on the ground of laches, from attacking the constitu-

tionality of the Reorganization Act, we decline to discuss the merits of their argument. (Slip Opinion, p. 7, Appendix A.)

We question both the power of the Court of Claims to invoke that doctrine and, even assuming that power in the abstract, the propriety of its application in the instant case. In this case, petitioners' claim was filed within the six-year period permitted by law, there was no resulting prejudice to the United States in the defense of this action (all pertinent facts having been stipulated), and there has been no accumulation of damages payable by the United States should petitioners ultimately prevail.[5] The only finding of prejudice by the Court of Claims was that a decision in favor of petitioners would amount to an "invitation" to future claims against the United States.

(a). Congress, in establishing the Court of Claims, purposely, expressly, and affirmatively relinquished the sovereign immunity of the United States from suit in certain defined classes of action, and granted to that court jurisdiction over such claims if timely filed. Because of this unique jurisdictional foundation, the six-year "statute of limitations" applicable in the Court of Claims has been recognized as a jurisdictional prerequisite [or condition precedent] to the exercise of the Court of Claims' adjudicatory function, which the court is bound to respect even if not put in issue by the litigants and even if affirmatively waived by those charged with the defense of the

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[5] Petitioners' claim, and their theory of entitlement, covers only the period from July 1, 1954, the "effective date" of Reorganization Plan No. 1 of 1954, and March 31, 1955, the date of the statutory expiration of the War Claims Commission.

United States, *Finn v. United States*, 123 U.S. 227 (1887), *Wallace v. United States*, 142 F.2d 240 (2d Cir., 1944), *cert. denied* 323 U.S. 712. If the six-year period is construed as a negation of jurisdiction beyond that point in time, *Kendall v. United States*, 107 U.S. 123 (1883), *Soriano v. United States*, 352 U.S. 270 (1957), does it not also operate as a positive affirmation of jurisdiction until the expiration of those six years? Can the court below deprive a claimant of the use of the forum created by Congress to adjudicate his claim when the express prescription of Congress governing assertion of the claim has been met?

Precisely, then, by applying laches it appears that the Court of Claims has, without the express or implied consent of Congress, effectively restored to the United States a portion of the "immunity" which Congress intended to, and did, expressly abrogate. The implications of this action loom even larger when it is recalled that the central issue whose adjudication was barred was the alleged unconstitutionality of a federal statute. We are aware of no cases where this Court on the grounds of laches has refused to consider a properly-raised constitutional question raised in the assertion of a claim at law.

In light of the apparent intent of Congress to establish for the Court of Claims both a unique subject-matter jurisdiction asserted within a specific period of time, the attempt by that court to qualify its own jurisdiction by application of a sweeping laches defense raises important federal questions concerning the nature and jurisdiction of the Court of Claims.

(b). The impact and ramifications of the Court of Claims' holding in the instant case — that constitutionally based claims may be swept under the rug if

a claimant's delay has raised the possibility of additional suits against the Government — could conceivably stifle the Court of Claims' role as a "special" open forum for litigation involving the United States. The court below did not find that the United States suffered any prejudice in the direct defense of this action. Rather, the court's holding was that fatal prejudice arose from the possibility that, if the reorganization of the War Claims Commission were held invalid, such holding would constitute an "invitation" to others to challenge the acts of the succeeding Foreign Claims Settlement Commission.

We do not concede that the invalidity of the attempted abolition of the War Claims Commission would necessarily imply that all official acts of the new agency are null and void (indeed, this point was briefed and argued below). But, even if such contingency were likely, the Court of Claims is *required by law* to adjudicate such claims against the United States. The anomaly becomes sharper stated thusly: the court in the present case has looked into the future and found that if it holds for petitioner in its present claim against the Government, that holding might inspire other unidentified persons to initiate claims against the Government. This naked possibility, the court held, defeats petitioners' right to prosecute the present action. In the fullest sense, the purposes and functions of the Court of Claims are at issue, and require determination by this Court.

(c). Yet a further repercussion of the use of "laches" as a bar to a constitutional claim, is suggested by this Court's landmark holding in *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923). In practical terms, the holding in that case indicates that the right to challenge the constitutionality of

federal statutes is vested in a precious few individuals having proper "standing to sue." In a sense, therefore, any individual (such as petitioners herein) who can and does challenge federal legislation, acts as spokesman for the entire nation. If, indeed, the Reorganization Act of 1949 is unconstitutional, and if petitioners may nonetheless be barred by laches, the invalidity of that act and the resulting Presidential action may never be litigated for lack of a claimant with proper standing. The implications of petitioners' challenge are, therefore, broader than their own financial interests, and should be weighed against the mechanical application of a seeming technicality such as laches to the actual prejudice of countless citizens who, though interested, lack standing to sue.

Moreover, the precedent established by the use of laches to bar a challenge of constitutionality is necessarily one of far-reaching consequence. Frequently persons having "standing" to challenge the constitutionality of legislation are unaware of the possibility of a favorable determination because of the existing social, political, or economic climate. Or perhaps, for practical reasons, they may choose to await resolution of pending actions. Still others may be unable to afford to institute suit promptly. Yet the passage of time and the continued "growth" of the law, notably through the pronouncements of this Court, may mature the acceptability of certain constitutional concepts. (At hand are the recent metamorphoses in the fields of legislative apportionment, criminal procedure, right to privacy, civil liberties, censorship, and voting requirements.) Would this Court, or any court, suggest that a citizen is precluded from challenging a poll-tax requirement if he has dutifully paid that tax for many years? Is a motion-picture distributor barred from challenging the validity of cen-

sorship procedures because he has submitted his pictures for review in the past? Could Oliver Brown have been prevented from contesting the constitutionality of school segregation on the grounds that by his delay he had "invited" countless additional suits against the school board?

(d). This Court exercises supervision over the Court of Claims insofar as that court formulates and enunciates principles of federal common law. In this case, the Court of Claims has, in effect, invoked and applied the equitable principle of laches to bar petitioners where the Government suffered no prejudice in the defense of the suit, where the sole relief sought by petitioners was *legal* relief (i.e., an award of back salary), where there has been no augmentation of the damages the United States may have to pay, and where the only "prejudice" found by the court below is the "possibility" that, if petitioners prevail in this action, the United States will be required to defend additional suits challenging the validity of acts of the Foreign Claims Settlement Commission. We have found no authority which sustains the propriety of "laches" on such type of "prejudice." Thus it appears the Court of Claims has developed a new rule of federal common law that any litigant who may suffer the usual "prejudice" incident to the loss of a lawsuit will now be able to successfully assert such prejudice to support a plea of laches. We challenge the soundness of such a rule. Since federal common law may also be applied in the federal district and circuit courts, we submit that the importance of this challenge surpasses the boundaries of the Court of Claims alone.

CONCLUSION

For all the foregoing reasons, the issues herein presented do involve serious, substantial and important federal questions of law which should be decided by this Court.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 518–59

(Decided October 15, 1965)

GEORGIA L. LUSK AND MYRON WIENER v. THE UNITED STATES

I. H. Wachtel, attorney of record, and *Jean L. Provost, Jr.*, for plaintiff.

Irving Jaffe, with whom was *Assistant Attorney General John W. Douglas*, for defendant. *Gerson B. Kramer* and *Ned William Manashil*, of counsel.

Before COWEN, *Chief Judge*, REED, *Justice* (*Ret.*), sitting by designation, LARAMORE, DURFEE, and COLLINS, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

COLLINS, *Judge*, delivered the opinion of the court:

Plaintiffs were, prior to their removal in December 1953, members of the War Claims Commission. In this action, each plaintiff seeks to recover the salary of a War Claims Commissioner for the period July 1, 1954, to March 31, 1955. Defendant has moved for summary judgment, and plaintiffs have filed a cross-motion for summary judgment.

The pertinent facts, which have been stipulated by the parties, can be summarized as follows: Effective as of December 11, 1953, President Dwight D. Eisenhower terminated each plaintiff's membership on the War Claims Commission. The underlying reason for the action of President Eisenhower was his determination that the Commission should be

composed of "personnel of my own selection." On December 18, 1953, plaintiffs wrote the Attorney General and requested the institution of a suit on behalf of the United States (*ex rel.* Myron Wiener and Georgia L. Lusk) against the persons who had succeeded them as members of the War Claims Commission. The Attorney General refused this request.

On February 3, 1954, plaintiff Wiener commenced, in the United States District Court for the District of Columbia, a *quo warranto* proceeding against the successor War Claims Commissioners. Holding that the removal of Wiener had been proper, the district court dismissed his action. On March 31, 1954, Wiener took an appeal to the United States Court of Appeals for the District of Columbia Circuit.

Thereafter, on April 29, 1954, acting pursuant to the Reorganization Act of 1949,[1] President Eisenhower transmitted to the Congress Reorganization Plan No. 1 of 1954. This plan proposed, *inter alia*, the abolition of the War Claims Commission and the transfer of its functions and those of the International Claims Commission to a new agency to be known as the Foreign Claims Settlement Commission. Neither House of Congress passed a resolution expressing disapproval of the reorganization plan. Accordingly, on July 1, 1954, the President abolished the War Claims Commission and put into effect the other provisions of the reorganization plan.[2] As a consequence of the abolishment of the War Claims Commission, the parties to the *quo warranto* suit stipulated that the action had "become moot." Thus, Wiener's appeal was dismissed.

On August 20, 1954, plaintiff Wiener filed an action in the Court of Claims. He asserted that his removal had been unlawful, and he sought to recover back pay for the period from December 10, 1953, through June 30, 1954. This court determined that the removal of Wiener had been valid and, therefore, his petition was dismissed. *Wiener* v. *United States*, 135 Ct. Cl. 827, 142 F. Supp. 910 (1956). Subsequently, this decision was reversed by the Supreme Court.

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[1] The Reorganization Act of 1949, 63 Stat. 203, as amended, 5 U.S.C. §§ 133z to z–15 (1964), is discussed *infra*.

[2] Reorganization Plan No. 1 of 1954 is set forth in the following: 19 Fed. Reg. 3985, 68 Stat. 1279, 5 U.S.C. § 133z–15 (1964).

357 U.S. 349 (1958). On September 5, 1958, the Court of Claims entered a judgment in favor of plaintiff Wiener in the net amount of $7,220.66. 143 Ct. Cl. 956 (1958).

Shortly after final disposition of Wiener's action in this court, plaintiff Lusk submitted to the General Accounting Office a claim for the pay which she had lost as a result of her removal from the War Claims Commission, *i.e.*, her salary from December 11, 1953, to June 30, 1954. On December 16, 1958, the Comptroller General certified that the claim of plaintiff Lusk was a valid one; shortly thereafter, she was paid the appropriate amount.

By a joint petition filed on December 2, 1959, plaintiffs instituted the present suit. The basis for this action is plaintiffs' contention that the abolishment of the War Claims Commission was unlawful. The period for which recovery is sought commences with July 1, 1954, the date the reorganization became effective, and ends on March 31, 1955, the date when plaintiffs' statutory terms of office were to expire.[3]

The argument of plaintiffs is twofold. First, they contend that the reorganization plan in question went beyond the scope of the Reorganization Act of 1949, 63 Stat. 203, as amended, 5 U.S.C. §§ 133z to z–15 (1964). Alternatively, plaintiffs assert that the reorganization of the War Claims Commission was in violation of the Constitution.

With respect to the initial argument of plaintiffs, a basic element is the fact, pointed out by the Supreme Court in *Wiener* v. *United States*, *supra*, that the task of the War Claims Commission was "intrinsic[ally] judicial" in character. The Court stated, 357 U.S. 349, 355, the following:

> * * * The claims [considered by the War Claims Commission] were to be "adjudicated according to law," that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was "entirely free from the control or coercive influence, direct or indirect," *Humphrey's Executor* v. *United States*, * * * [295 U.S. 602, 629 (1935)], of either the Executive or the Congress. * * *

[3] The date for the expiration of the terms of the War Claims Commissioners (March 31, 1955) was established by § 2 of the War Claims Act of 1948, ch. 826, § 2, 62 Stat. 1240, as amended, ch. 27, 65 Stat. 28 (1951).

It should be recalled that the prior recovery sought and obtained by plaintiffs Lusk and Wiener, respectively, extended only to June 30, 1954.

In the instant case, plaintiffs stress the distinction between (1) the adjudicatory functions of the War Claims Commission and (2) its executive and administrative functions. According to plaintiffs, only the latter type of activities could properly be affected by a reorganization plan. Thus, plaintiffs assert that, in abolishing the War Claims Commission and in transferring all of its functions to a new agency,[4] the President exceeded his statutory authority.

In order to resolve this matter of interpretation of the Reorganization Act of 1949, we must look first to the statute itself. The fundamental characteristic of the Reorganization Act of 1949 and of prior similar acts was the use of cooperation between the executive and legislative branches in order to achieve executive reorganization. See H.R. Rep. No. 23, 81st Cong., 1st Sess. 6 (1949). The 1949 act set forth a procedure whereby the President would submit reorganization plans to the Congress and such plans would take effect after 60 days (of continuous session of Congress) unless either House passed a resolution of disapproval. 63 Stat. 205, as amended, 5 U.S.C. § 133z–4 (1964).

Unlike its predecessor (the Reorganization Act of 1945), the 1949 act contained no express limitation with regard to the effects which a reorganization plan might have upon "quasi-judicial or quasi-legislative" functions.[5] Plaintiffs assert that such a restriction should be read into the 1949 act, but we do not agree.

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[4] Plaintiffs stress the fact that, under Reorganization Plan No. 1 of 1954, members of the Foreign Claims Settlement Commission held office "during the pleasure of the President," whereas the President had lacked the power to remove members of the War Claims Commission (*Wiener* v. *United States*, *supra*). Also, plaintiffs point out that, in 1962, Congress amended the War Claims Act to provide that, in the future, members of the Foreign Claims Settlement Commission would have fixed terms of office. 76 Stat. 1113 (1962), 50 U.S.C. App. § 2001 (Supp. V, 1959–63).

[5] Section 5(a) of the Reorganization Act of 1945, ch. 582, § 5(a), 59 Stat. 615, provided, in part, as follows:

"• • • No reorganization plan shall provide for, and no reorganization under this Act shall have the effect of—

• • • • •

"(6) imposing, in connection with the exercise of any quasi-judicial or quasi-legislative function possessed by an independent agency, any greater limitation upon the exercise of independent judgment and discretion, to the full extent authorized by law, in the carrying out of such function, than existed with respect to the exercise of such function by the agency in which it was vested prior to the taking effect of such reorganization; except that this prohibition shall not prevent the abolition of any such function; • • •"

We find, contrary to plaintiffs' contentions, that Congress did *not* wish the Reorganization Act of 1949 to impose any general limitation upon the reorganization of quasi-judicial and quasi-legislative functions. Each House of Congress accepted the recommendation of the Hoover Commission that no such limitation should be adopted. See S. Rep. No. 232, 81st Cong., 1st Sess. 8 (1949), and H.R. Rep. No. 23, 81st Cong., 1st Sess. 7 (1949).

In explaining its general opposition to exemptions and to limitations on the power of the President to prepare reorganization plans, the Hoover Commission expressed the belief that "the safeguard against unwise reorganization plans lies both in a sound exercise of the President's discretion and in the reserve power in the Congress * * * to disapprove any proposed plan."[6] A similar view was stated by President Truman in his January 17, 1949, message to the Congress. See S. Rep. No. 232, 81st Cong., 1st Sess. 5 (1949). With respect to the present litigation, the following statements of the Hoover Commission[7] are especially relevant:

> * * * the inclusion of general language, like that contained in section 5(a)(6) of the Reorganization Act of 1945 * * * [see footnote 5, *supra*], intended to prevent the submission of any plan which imposes limitations upon the independent exercise of "quasi legislative" or "quasi judicial" functions, would, in the Commission's judgment, be unwise. The phrases are extremely vague and of uncertain meaning. Ingenious and plausible arguments can be made to apply them to a wide range of functions which should clearly be subject to reorganization procedure. *Such arguments would not be matters of purely theoretical concern or legislative debates; for the validity of reorganization could be made the subject of protracted litigation by private interests resisting the acts of a reorganized agency on the ground that it was illegally constituted.* It might take several years of litigation to lay down interpretations

[6] On January 13, 1949, the Honorable Herbert Hoover, Chairman of the Commission on Organization of the Executive Branch of the Government, sent to each House a letter containing recommendations as to legislation on reorganizations. These letters were included in the respective reports. See S. Rep. No. 232, 81st Cong., 1st Sess. 2 (1949), and H.R. Rep. No. 23, 81st Cong., 1st Sess. 3 (1949).

[7] These statements were contained in the letters referred to in footnote 6, *supra*.

> of these general phrases and even then, uncertainty would remain. (Emphasis supplied.)

As indicated above, this recommendation of the Hoover Commission and the similar one of President Truman were accepted by the Congress. Plaintiffs' construction of the 1949 act attributes to Congress a purpose which each House expressly disavowed. For this reason, we reject the assertion of plaintiffs that the reorganization of the War Claims Commission fell outside the limits of the act.[8]

After receiving from President Eisenhower the reorganization plan in question, neither House of Congress passed a resolution disapproving it. In view of the terms of the Reorganization Act of 1949, it is clear that, by not exercising its power of disapproval, the Congress indicated its full acceptance of the plan.[9] Although plaintiffs dispute this view (on the ground that the plan was not within the ambit of the 1949 act), they furnish no specific evidence in support of their position. That is, there is no indication whatsoever that the Congress considered the reorganization of the War Claims Commission to be "unlawful." We hold, therefore, that the Congress did intend Reorganization Plan No. 1 of 1954 to become effective.

Furthermore, there exists an additional reason why plaintiffs cannot succeed with their assertion that the reorganization plan exceeded the limits of the Reorganization Act of 1949. One of the affirmative defenses put forth by defendant is that of laches, and we agree with defendant that plaintiffs' action is barred by laches.

Although pertinent to plaintiffs' initial argument, the defense of laches applies with special force to their second argument, *i.e.*, their effort to challenge the constitutionality of the Reorganization Act of 1949. Basically, the second

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[8] Since we have determined, on the basis of the language and the legislative history of the Reorganization Act of 1949, that plaintiffs' interpretation is not correct, we deem unnecessary discussion of the arguments as to the "contemporaneous construction" of that act.

[9] Citing *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959), plaintiffs assert that congressional inactivity cannot cure the invalidity of the exercise by the executive of power not delegated or not properly delegated. One difficulty with this assertion is that plaintiffs appear to overlook the specific function, under the Reorganization Act of 1949, of "congressional inactivity." See the discussion, *supra*, of legislative-executive cooperation under the 1949 act. The facts of *Greene* v. *McElroy* are readily distinguishable from those of the present case.

argument of plaintiffs is that, if Congress did intend to grant to the President the powers exercised in reorganizing the War Claims Commission, such a delegation contravenes the Constitution.[10] Plaintiffs declare that abolition of the Commission amounted to repeal by the President of the War Claims Act of 1948, ch. 826, § 2, 62 Stat. 1240, as amended, ch. 27, 65 Stat. 28 (1951). Further, according to plaintiffs, the Reorganization Act of 1949 embodied such a broad delegation of legislative power that the act cannot be allowed to stand.

Since we hold that plaintiffs are precluded, on the ground of laches, from attacking the constitutionality of the Reorganization Act, we decline to discuss the merits of their argument.[11] It is sufficient to point out our reasons for applying the doctrine of laches.

The first element of laches is unreasonable delay, and plaintiffs are guilty of such delay. The matter complained of, abolition of the War Claims Commission, occurred on July 1, 1954. The present suit was not filed until December 2, 1959, 5 years and 5 months later. In other cases which involved periods of much shorter duration, this court has raised the bar of laches. See *Alpert* v. *United States*, 161 Ct. Cl. 810, 820 (1963), and cases cited there.

As indicated in *Alpert* v. *United States*, *supra*, at 821, laches is an "equitable doctrine," and it will not be applied when the plaintiff provides a satisfactory explanation for the delay or when the defendant fails to show resulting prejudice. The explanation offered by the present plaintiffs is not a sufficient one. Plaintiffs state that they have been diligent in seeking relief, since it was not until June 30, 1958 (the date the Supreme Court ruled that the removal of Wiener had been unlawful), that their right to bring the present suit "matured."

Aside from the fact that 17 months elapsed between the decision of the Supreme Court and the commencement of

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[10] Regarding the matter of the delegation of legislative power, plaintiffs cite the following cases: *Yakus* v. *United States*, 321 U.S. 414 (1944); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

[11] In declining to discuss the constitutional issues, we are mindful of the general policy that constitutional questions should not be decided unless it is absolutely necessary to do so. *Cf., e.g., United States* v. *International Union United Automobile Workers*, 352 U.S. 567, 590 (1957).

this action, there is a basic fallacy in plaintiffs' view. It is true that plaintiffs would not have been able to *recover* on the basis of their present theory until it was determined that their removal was wrongful. However, the *accrual* of plaintiffs' action was not dependent upon such a determination, but in fact occurred prior thereto. For instance, Wiener could have amended the petition in his prior action in this court so as to include the claim now being asserted. Similarly, plaintiff Lusk could have commenced a suit immediately after the abolition of the War Claims Commission. Yet, until the bringing of the instant suit, there was no manifestation by either plaintiff of intent to attack the validity of the reorganization. Plaintiffs have not been diligent in pressing this claim.

With regard to the matter of detriment to the Government, the present case differs from the typical employee-removal suit. Often, laches is applied to prevent a dilatory plaintiff from recovering back salary for a lengthy period during which he rendered no service to the Government. *E.g.*, *Alpert* v. *United States*, *supra*, at 821. See *United States ex rel. Arant* v. *Lane*, 249 U.S. 367, 372 (1919).

In the instant case, much more is at stake. Acceptance of plaintiffs' argument regarding the unconstitutionality of the 1949 act would mean, at the very least, that Reorganization Plan No. 1 of 1954 was invalid. If we were to make such a holding, this would strike down not only the abolition of the War Claims Commission, but also the establishment of the Foreign Claims Settlement Commission. The latter body is still in existence and it has been functioning throughout the period of plaintiffs' delay. To hold invalid or unconstitutional the plan which created the Foreign Claims Settlement Commission would amount to an invitation to suits on the part of disappointed claimants.[12] In fact, this possibility of "litigation by private interests resisting the acts of a reorganized agency on the ground that it was

[12] It might be argued that no such suit could succeed since decisions of the Foreign Claims Settlement Commission are entitled to finality. See, *e.g.*, § 11 of the War Claims Act of 1948, 62 Stat. 1246, as amended, 50 U.S.C. App. § 2010 (Supp. V, 1959–63). However, a dissatisfied claimant could assert that Congress could not give finality to the determinations of an agency created by an unlawful reorganization plan. It would seem that the finality provision presupposes the validity of the Foreign Claims Settlement Commission.

illegally constituted" is the precise danger which the Hoover Commission warned against in its above-mentioned letters to the Congress. Plaintiffs, by neglecting to bring the present action until December 1959, permitted an increase in the possible amount of such litigation. This in itself constitutes sufficient prejudice to the Government.

Plaintiffs' efforts to minimize the consequences of their delay are not persuasive. They say that any possible claims would be barred by the 6-year statute of limitations, since the "War Claims Act jurisdiction" of the Foreign Claims Settlement Commission expired on March 31, 1955. Plaintiffs' error is their assumption that only decisions under the "War Claims Act jurisdiction" would be "cast into doubt." As we have indicated, if the plan which created the Foreign Claims Settlement Commission were invalid, then virtually *all* decisions of that body would be vulnerable. Abolition of the War Claims Commission and establishment of the Foreign Claims Settlement Commission were integral parts of the reorganization plan. It would be incongruous to say that (1) the abolition was not lawful, but (2) creation of the successor body was effective. *Cf. Fowler* v. *Gage*, 301 F. 2d 775, 778 (10th Cir. 1962). Thus, we reject plaintiffs' contention.

Next, plaintiffs assert that the doctrine of "*de facto* officers" would prevent the reopening of the determinations of the Foreign Claims Settlement Commission. To illustrate this doctrine, plaintiffs cite *McDowell* v. *United States*, 159 U.S. 596 (1895) and *Ex parte Ward*, 173 U.S. 452 (1899). This argument of plaintiffs overlooks an important distinction. If the reorganization plan were invalid, the result would be not *de facto officers*, but *de facto offices*. Regarding the latter, a pertinent decision is *Norton* v. *Shelby County*, 118 U.S. 425, 441 (1886), where the Court stated:

> * * * it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. * * *

See also *United States* v. *Royer*, 268 U.S. 394, 397 (1925). Since the above reasoning would appear to be applicable here, plaintiffs' suggestion as to the *de facto* officer doctrine is not sound.

In conclusion, we hold that the defense of laches bars plaintiffs' attack on the constitutionality of the Reorganization Act of 1949. This defense applies as well to plaintiffs' contention regarding interpretation of the 1949 act. Moreover, we have found that there is no merit in the statutory interpretation put forth by plaintiffs. In view of these determinations, we need not consider the other defenses which defendant has asserted.

It follows, therefore, that plaintiffs are not entitled to recover. Their motion for summary judgment is denied. Defendant's motion for summary judgment is granted, and the petition is dismissed.

APPENDIX B

[Filed for Defendant,
Mar. 18, 1964,
Office of the Clerk
U.S. Court of Claims]

IN THE
UNITED STATES COURT OF CLAIMS

GEORGIA L. LUSK and MYRON WIENER, Plaintiffs,	)	
v.	)	No. 518-59
THE UNITED STATES, Defendant.	)	

STIPULATION OF FACTS

It is hereby stipulated by and between counsel for the respective parties that the following facts shall be considered as having been proved in this case:

1. On or before December 10, 1953 plaintiffs Myron Wiener and Georgia L. Lusk were serving as War Claims Commissioners under valid appointments made by the President, by and with the advice and consent of the Senate of the United States.

2. Under date of December 10, 1953 each of the plaintiffs received a letter from Dwight D. Eisenhower, President of the United States, which stated as follows:

I regard it as in the national interest to complete the administration of the War Claims Act of 1948, as amended, with personnel of my own selection. To that end, Mr. C. F. Willis, Jr. of my staff transmitted my wish that you and your associate resign your commissions. I understand from Mr. Willis that you are unwilling to do so.

Accordingly, effective as of December 11, 1953, you are hereby removed from the office of Member of the War Claims Commission.

3. On December 11, 1953 the President made recess appointments of other individuals to take the place of the plaintiffs. By letter dated December 14, 1953 plaintiff Myron Wiener notified the President in writing of his opposition to the removal action, advising him that he held himself available and ready to perform the duties of his office as a War Claims Commissioner (See Finding 6, 135 C.Cls. 835-838).

4. Under date of December 18, 1953 the plaintiffs, Myron Wiener and Georgia L. Lusk, by their attorney, wrote to the Attorney General requesting that either he or the United States Attorney for the District of Columbia, under the provisions of Chapter XVI of the District of Columbia Code, 31 Stat. 1319, institute suit on behalf of the United States on the relation of Myron Wiener and Georgia L. Lusk against the incumbent holders of the office of members of the War Claims Commission. This request was refused.

5. Thereafter, under date of February 3, 1954 the plaintiff, Myron Wiener but not the plaintiff Georgia L. Lusk, instituted an action in the United States District Court for the District of Columbia applying for a writ in the nature of *quo warranto* against the successor incumbent members of the War Claims Commission. This action was denominated *"The United*

States of America ex rel. Myron Wiener v. Raymond T. Armbruster, Whitney Gilliland and Pearl Carter Pace, Civil Action 447-54". Thereafter the writ issued and a hearing was had on respondents' motion to dismiss or in the alternative for summary judgment; on March 30, 1954 the writ was quashed and the action dismissed in accordance with the Court's opinion of March 25, 1954 that the President's removal action was valid and constitutional. Under date of March 31, 1954 the petitioner-relator, Myron Wiener, took an appeal from the District Court's order of dismissal.

6. Under date of April 29, 1954 the President transmitted to the Congress Reorganization Plan No. 1 of 1954 which plan, *inter alia,* proposed to abolish the War Claims Commission, effective July 1, 1954 and to transfer its functions to a newly created commission entitled "The Foreign Claims Settlement Commission of the United States." (See House Document No. 381, 83rd Congress, 2d Sess.) Between April 29, 1954 and July 1, 1954 the Congress of the United States took no action on the aforesaid reorganization plan.

7. On July 1, 1954 the President, acting pursuant to Reorganization Plan No. 1 of 1954, abolished the War Claims Commission, including the offices of the members of said Commission, and transferred all of the functions of said Commission and the members thereof to the newly created Foreign Claims Settlement Commission of the United States.

8. On August 9, 1954 the petitioner-relator and the respondents filed an agreement to dismiss the pending appeal in the *quo warranto* action. Said Agreement of Dismissal in pertinent part stated as follows:

"IT IS HEREBY AGREED between the parties hereto, inasmuch as the War Claims Commission has been abolished by Reorganization Plan No. 1 of 1954 (19 Fed. Reg. 3985) and this action has become moot, that the above-entitled cause be dismissed under Rule 21, and the Clerk is hereby directed to enter the case dismissed, . . ."

9. Under date of August 20, 1954 Myron Wiener filed an action in this Court which was assigned Docket No. 337-54, which action claimed back pay from December 10, 1953 through June 30, 1954 on the ground that the President's removal action was illegal and unconstitutional. Thereafter there was a full trial on the merits of the aforesaid action in this Court and the Commissioner of the Court made full and complete findings of fact upon the record established.

10. By decision dated July 12, 1956 this Court upheld the validity of the President's removal action and dismissed the petition of Myron Wiener (135 C.Cls. 827). Whereupon, plaintiff petitioned the Supreme Court for a writ of certiorari which petition was granted by that Court (352 U.S. 980). After hearing plaintiff Wiener's case the Supreme Court, by decision dated June 30, 1958, 357 U.S. 349, reversed the decision of this Court and held that plaintiff's removal from office was unlawful. (See 142 C.Cls. 932).

11. Thereafter, on August 19, 1958, counsel for the parties in the aforesaid action filed a stipulation with this Court, agreeing that plaintiff Myron Wiener was entitled to entry of judgment in the net amount of $7,220.66 which sum represented the difference between the sum of $8,197.06, the amount of plaintiff's claim in the aforesaid action, and the sum of $976.40,

the amount of a counterclaim, with interest, asserted by defendant in said action (See 143 C.Cls. 950). The defendant's counterclaim concerned an independent matter not otherwise pertinent herein. On September 5, 1958 this Court entered judgment in favor of Myron Wiener in the sum of $7,220.66, which sum, thereafter, was paid to Myron Wiener by defendant.

12. Soon after the disposition of the case, *Myron Wiener v. United States*, the plaintiff Georgia L. Lusk, through her attorney, submitted a claim to the General Accounting Office for pay lost as a result of her illegal removal from her office as a member of the War Claims Commission. Said claim was set forth in a letter dated September 3, 1958 from plaintiff's attorney to the Comptroller General (See Exhibit 1 to Defendant's Answer). Said claim was supplemented by an affidavit of plaintiff Georgia L. Lusk in support of her claim (See Exhibit 2 to Defendant's Answer), and a power of attorney executed by plaintiff Georgia Lusk (See Exhibit 3 to Defendant's Answer). In the aforesaid submissions to the General Accounting Office plaintiff Georgia L. Lusk requested pay on account of salary lost from December 10, 1953 to and including June 30, 1954.

13. Under date of December 16, 1958 the Comptroller General issued a certificate of settlement certifying that there was due from the United States to Georgia L. Lusk the sum of $8,197.06 on account of salary for the period December 11, 1953 to June 30, 1954 as a member of the War Claims Commission (See Exhibit 4 to Defendant's Answer). Thereafter, plaintiff Georgia L. Lusk was paid the aforesaid sum less appropriate deductions for civil service retirement contributions and income tax withholding.

14. The joint petition of plaintiffs Georgia L. Lusk

and Myron Wiener in the instant case was filed on December 2, 1959.

It is further stipulated and agreed that the documents appearing as Exhibits 1, 2, 3, and 4 to Defendant's Answer, filed April 29, 1960, shall be deemed a part of the record in this case and may be considered as having been offered in evidence herein.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1014

GEORGIA L. LUSK AND MYRON WIENER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a–10a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 15, 1965. On January 12, 1966, the Chief Justice extended the time in which to file a petition for a writ of certiorari to February 13, 1966. The petition for a writ of certiorari was filed on February 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly held that petitioners, who were members of the War Claims

Commission, are not entitled to pay for a period following the abolition of the Commission.

STATUTES INVOLVED

The Reorganization Act of 1949, 63 Stat. 203, 5 U.S.C. § 133z (1952) provides in relevant part:

> SEC. 133z. DECLARATION OF OBJECTIVES AND PURPOSES OF REORGANIZATION PLANS.
>
> (a) The President shall examine and from time to time reexamine the organization of all agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:
>
> (1) to promote the better execution of the laws, the more effective management of the executive branch of the Government and of its agencies and functions, and the expeditious administration of the public business;
>
> (2) to reduce expenditures and promote economy, to the fullest extent consistent with the efficient operation of the Government;
>
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;
>
> (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
>
> (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
>
> (6) to eliminate overlapping and duplication of effort.
>
> (b) The Congress declares that the public interest demands the carrying out of the pur-

poses specified in subsection (a) of this section and that such purposes may be accomplished in great measure by proceeding under the provisions of sections 133z to 133z–15 of this title, and can be accomplished more speedily thereby than by the enactment of specific legislation. (June 20, 1949, ch. 226, title I, § 2, 63 Stat. 203).

SEC. 133z–4. EFFECTIVE DATE OF REORGANIZATIONS SPECIFIED IN PLAN.

(a) Except as may be otherwise provided pursuant to subsection (c) of this section, the provisions of the reorganization plan shall take effect upon the expiration of the first period of sixty calendar days of continuous session of the Congress, following the date on which the plan is transmitted to it; but only if, between the date of transmittal and the expiration of such sixty-day period there has not been passed by either of the two Houses, by the affirmative vote of a majority of the authorized membership of that House, a resolution stating in substance that that House does not favor the reorganization plan.

* * * * *

(c) Any provision of the plan may, under provisions contained in the plan, be made operative at a time later than the date on which the plan shall otherwise take effect. (June 20, 1949, ch. 226, title I, § 6, 63 Stat. 205.)

SEC. 133z–5. DEFINITION OF "AGENCY."

When used in sections 133z to 133z–15 of this title, the term "agency" means any executive department, commission, council, independent

establishment, Government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government, and means also any and all parts of the municipal government of the District of Columbia except the courts thereof. Such term does not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government. (June 20, 1949, ch. 226, title I, § 7, 63 Stat. 205.)

SEC. 133z–6. WHAT CONSTITUTES A "REORGANIZATION."

For the purposes of sections 133z to 133z–15 of this title the term "reorganization" means any transfer, consolidation, coordination, authorization, or abolition, referred to in section 133z–1 of this title. (June 20, 1949, ch. 226, title I, § 8, 63 Stat. 206.)

STATEMENT

Petitioners served as members of the War Claims Commission until President Eisenhower removed them from office in December 1953 [1] (Pet. App. 11a–12a).

On April 29, 1954, the President transmitted to Congress Reorganization Plan No. 1 of 1954, which abolished both the War Claims Commission and the International Claims Commission and transferred their functions to the newly created Foreign Claims Settlement Commission. 100 Cong. Rec. 5738, 5788. Neither

[1] Successors, named by recess appointment, were not confirmed by the Senate prior to the abolition of the War Claims Commission on July 1, 1954, discussed below.

House of Congress passed a resolution disapproving the plan. It therefore went into effect on July 1, 1954, pursuant to the Reorganization Act of 1949, *supra*.[2]

In August 1954, petitioner Wiener sued in the Court of Claims for salary from December 10, 1953 through June 30, 1954 (the day before the War Claims Commission was abolished). The Court of Claims dismissed the action. This Court reversed, holding that the attempted removal of Wiener had been unlawful. *Wiener* v. *United States*, 357 U.S. 349. The Court of Claims, on remand, entered judgment in favor of Wiener (Pet. App. 14a–15a). Petitioner Lusk filed a similar claim with the General Accounting Office and received payment (Pet. App. 15a).

On December 2, 1959, petitioners sued in the Court of Claims for salary from July 1, 1954 to March 31, 1955, the date the War Claims Commission would have expired by statute (Pet. App. 3a). They urged that the War Claims Commission was not abolished by Congress' acceptance of Reorganization Plan No. 1 of 1954, because (1) the Reorganization Act of 1949 does not authorize the President to abolish quasi-

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[2] In February 1954, petitioner Wiener had brought suit in the United States District Court for the District of Columbia, seeking a writ in the nature of *quo warranto* against the successor members of the War Claims Commission. The writ issued, but, after a hearing, it was quashed and the action was dismissed. Wiener filed an appeal (Pet. App. 12a–13a) which he agreed to dismiss on August 9, 1954 (Pet. App. 14a):

> "IT IS HEREBY AGREED between the parties hereto, inasmuch as the War Claims Commission has been abolished by Reorganization Plan No. 1 of 1954 (19 Fed. Reg. 3985) and this action has become moot, that the above-entitled cause be dismissed under Rule 21 * * *."

judicial agencies such as the War Claims Commission and (2) if the Act gives the President that power, it is unconstitutional. On cross-motions for summary judgment, the Court of Claims held that the Reorganization Act of 1949 does apply to quasi-judicial and quasi-legislative agencies, and that petitioners' claims are barred by laches in any event.

ARGUMENT

1. The Court of Claims interpreted the Reorganization Act of 1949 in accordance with its plain language and legislative history. The Act provides that the President "shall examine * * * all agencies of the Government," including independent establishments and commissions, to determine whether the interests of economy and efficiency require that they be reorganized or abolished (§§ 133z, 133z–5, 133z–6, *supra*). A plan of reorganization becomes effective sixty days after the President submits it to Congress unless a single House disapproves it by resolution of a majority "of the authorized membership" (§ 1332z–4(a), *supra*). Petitioners urged below that, despite these provisions, Congress did not intend independent agencies performing quasi-judicial or quasi-legislative functions to be subject to that procedure. The Court of Claims, however, correctly rejected the contention (Pet. App. 4a–6a). "Unlike its predecessor (the Reorganization Act of 1945), the 1949 act contained no express limitation with regard to the effects which a reorganization plan might have upon quasi-judicial or quasi-legislative functions" (Pet. App. 4a, n. 5). Congress eliminated the prior restriction upon the recommendations of President Truman and the

Hoover Commission. S. Rep. No. 232, 81st Cong., 1st Sess. pp. 2, 3–5; H. Rep. No. 23, 81st Cong., 1st Sess. pp. 3, 4–5. The House debates (95 Cong. Rec. 890–923) show that exemptions or special treatment for certain independent agencies (*e.g.*, the Federal Communications Commission, the United States Maritime Commission, and the Federal Power Commission (95 Cong. Rec. 910)) were considered, but were omitted from the Act as passed. See S. Rep. No. 232, *supra*, pp. 10–11, 12. Furthermore, when Reorganization Plan No. 1 of 1954 was submitted to Congress it brought little reaction; neither House attempted to block the abolition of the War Claims Commission. "Evidently the Congress felt the * * * [plan] was within the ambit of the statute * * *."[3] Cf. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15.

2. On the ground of decision ultimately adopted by the Court of Claims, it need not have reached the question of the scope of the 1949 Act, nor was it

[3] The Court of Claims' interpretation of the Reorganization Act of 1949 in no way conflicts with *Wiener* v. *United States*, 357 U.S. 349. That case was limited, as the opinion makes plain: "Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it" (357 U.S. at 356). In the present case, to the contrary, it would do violence to the Reorganization Act of 1949 to hold that Congress did not intend to authorize the President (with its concurrence) to reorganize independent as well as executive agencies (see Pet. App. 6a).

required to consider the constitutional issue raised by petitioners. The court below held that petitioners' claim was barred by laches in view of the five-year and five-month delay in bringing suit[4] (Pet. App. 6a–10a).

Since Reorganization Plan No. 1 of 1954 became effective on July 1, 1954, petitioner Wiener could have raised the matter of the reorganization in his first Court of Claims suit filed on August 20, 1954. However, he chose not to do so.[5] Petitioner Lusk did nothing until Wiener's successful prosecution of the previous case. In these circumstances, petitioners' suits were properly dismissed on account of unreasonable delay. *United States ex rel. Arant* v. *Lane,* 249 U.S. 367; *Nicholas* v. *United States,* 257 U.S. 71; *Norris* v. *United States,* 257 U.S. 77. Much shorter intervals than five years have often been held to foreclose litigation. *Arant, supra,* (22 months); *Morse* v. *United States,* 59 Ct. Cls. 139, 155 (14 months); *Grasse* v. *Snyder,* 192 F. 2d 35 (C.A.D.C.) (16 months);

[4] In the Court of Claims, the government also urged that petitioner Wiener was barred by the doctrine of res judicata or by the rule against splitting his cause of action; and that petitioner Lusk was barred because of accord and satisfaction. The Court of Claims did not consider these defenses because of its decision on other grounds (Pet. App. 10a), but of course the issues are left open.

[5] Rather, in his earlier petition for a write of certiorari, Wiener (Record in No. 52, 1957 Term, p. 5) represented that the War Claims Commission had been abolished "in manner provided for in the Reorganization Act of 1949 (5 U.S.C. 133Z–9) [sic] and all of the functions of the War Claims Commission and of the members thereof transferred to the Foreign Claims Settlement Commission of the United States."

Drown v. *Higley*, 244 F. 2d 744 (C.A.D.C.) (over 2 years); *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A. D.C.), certiorari denied, 361 U.S. 841 (33 months); *Plunkett* v. *United States*, 58 C. Cls. 359, 370 (37 months); *Evans* v. *Leedom*, 265 F. 2d 125 (C.A.D.C.), certiorari denied, 361 U.S. 935 (38 months). Moreover, prejudice to the government is far greater in this case than it is in the usual situation in which the doctrine of laches prevents "a dilatory plaintiff from recovering back salary for a lengthy period during which he rendered no service to the Government" (Pet. App. 8a). Here, petitioners in effect challenge the validity of governmental acts undertaken in relation to vast numbers of individuals. Petitioners' acquiescence in the abolition of the War Claims Commission and the transfer of its functions denied to the government an opportunity to remedy whatever defect (if any) might have existed in the reorganization. As the case was presented below, it was certainly within the sound discretion of the Court of Claims to invoke the equitable doctrine of laches.

3. The necessity of reaching the statutory and constitutional issues raised by petitioners is obviated for an additional reason which may be noticed although it was not argued below. Congress affirmatively adopted the reorganization shortly after the President's plan went into effect. It repealed the provision by which it had created the War Claims Commission and amended the War Claims Act to refer to the Foreign Claims Settlement Commission of the United States. Act of August 21, 1954, P.L. 615, 68 Stat. 759, 762. Congress then authorized the Foreign

Claims Settlement Commission to use funds previously appropriated for the administrative expenses of the War Claims Commission (68 Stat 815; 68 Stat. 1033, 1037). These statutes "confirmed and approved" the abolition of the War Claims Commission and the transfer of its functions to the Foreign Claims Settlement Commission.[6] *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 301–302. See, also, *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 147; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 631, n. 1 (concurring opinion of Mr. Justice Douglas), 635–637 (concurring opinion of Mr. Justice Jackson), 661, n. 3 (concurring opinion of Mr. Justice Clark). While we submit that the implementation of Reorganization Plan No. 1 of 1954 constituted a proper exercise of the combined powers of the President and Congress, the specific legislation which rapidly followed was, in any event, a complete ratification of the plan.[7]

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[6] Even before this legislation was approved, the Senate on July 23, 1954, received the President's nominations of the members of the Foreign Claims Settlement Commission. 100 Cong. Rec. 11597. All were confirmed by August 9, 1954. 100 Cong. Rec. 13586, 13733.

[7] If congressional ratification may be found from circumstances not amounting to specific legislation (see *Swayne & Hoyt, Ltd.* v. *United States*, *supra*), the affirmative action of Congress here should allow no room for doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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